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Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: WT Docket No. 94-147

Dear Ms. Salas:

Transmitted herewith, on behalf of James A. Kay, Jr., is an original and six (6) copies of his Status Report.

Should the Commission have any questions with respect to this filing, please communicate with the undersigned.

Sincerely yours,



Aaron P. Shainis
Counsel for
JAMES A. KAY, JR.

Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FILED
JUL 30 1998
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of)	
)	
JAMES A. KAY, JR.)	WT Docket No. 94-147
)	
Licensee of one hundred fifty two Part 90)	
licenses in the Los Angeles, California area)	

To: Administrative Law Judge Richard L. Sippel

STATUS REPORT OF JAMES A. KAY, JR.

James A. Kay, Jr. ("Kay"), by his attorneys, hereby submits his status report in accordance with the Presiding Judge's *Order* (FCC 98M-91; released July 6, 1998).

A. Introduction

1. During an informal, and off-the-record, telephone conference held on June 30, 1998, the Presiding Judge and counsel for both parties discussed Kay's position regarding the impact of Section 312(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(d), on the order of proceeding in this case. Because this is purely a license revocation case pursuant to Section 312 of the Act, and involves neither initial nor renewal applications pursuant to Section 309 of the Act, the burden of proceeding with the introduction of evidence as to all designated and added issues rests exclusively with the Bureau. (The Bureau also has the burden of proof.) Kay maintains that it would therefore be a violation of Section 312(d) to require him to introduce evidence or otherwise present his case in chief until such time as the Bureau has rested its case. During the June 30 telephone conference, the Presiding Judge disputed Kay's position, and the Bureau took no position.

2. Following the telephone conference, the Presiding Judge issued an *Order* (FCC 98M-91) in which he stated: "The parties have a month to try to reach some accord on the question, subject to approval by the Presiding Judge. ... The parties are to submit Status Reports

on **July 30, 1998**, in which the issue of Direct Case exhibits will be addressed. Counsel for Kay should cite relevant authority for his position." *Order* at 2 (bold emphasis in original).¹ Kay now submits his status report in accordance with the *Order*.

B. Preliminary Statement

3 The burden of proceeding issue is not frivolous. It is a legitimate position being advanced by Kay in good faith and based on a clear statutory provision. However, in the *Wireless Telecommunications Bureau's Opposition to Motion to Recuse Presiding Judge*, filed on July 29, 1998, the Bureau made an unwarranted and unjustifiable attack on the integrity of Kay and undersigned counsel simply for advocating this position on behalf of Kay. The Bureau is certainly free to take issue with Kay's interpretation of Section 312, and a respectful disagreement will be responded to respectfully. But Kay and his counsel should be free to advance legitimate statutory arguments without having their integrity impugned.

4. Specifically, the Bureau stated:

The conduct of Kay and his counsel in the Marc Sobel proceeding (WT Docket No. 97-56) also shows the speciousness of Kay's current position. ... Counsel for Sobel, who now also represents Kay in this proceeding, agreed to conduct his cross-examination of Sobel with respect to the Bureau's case at the same time he conducted his own direct examination of Sobel. ... The Bureau must question why Kay's counsel would have embraced such a procedure in one proceeding only to [oppose] it in [this] proceeding.

Opposition to Motion to Recuse at ¶ 12. The Sobel proceeding was designated pursuant to both Section 309(e) (involving both new and renewal applications as to which the statute places the burdens of proceeding and proof on the applicant) and Section 312(d) (involving license revocation and potential forfeiture, as to which the statute places the burdens of proceeding and proof on the Commission). The Communications Act does not expressly give Section 312(d)

¹ It is noteworthy that the Presiding Judge specifically directed counsel for Kay, but not counsel for the Bureau, to cite relevant authority for its position. While the Presiding Judge frequently professes impartiality in this case, it seems that the Bureau is easily able to defeat Kay's assertions based on clear statutory language without being required to cite any authority, indeed, without even having taken a position on the matter¹

priority over Section 309(e), or vice versa. Because the ultimate issues in the Sobel proceeding (*i.e.*, whether to deny pending applications, whether to impose a monetary forfeiture, and whether to revoke existing licenses) arose out of a common set of facts, Sobel agreed to an order of proceeding that was tantamount to a simultaneous "going forward" with the introduction of evidence. There is no inconsistency between this procedure and the position advocated by Kay in this case; but, even if there were, Kay can not be deemed to have waived his rights under Section 312 because of something his attorney did in another proceeding for another client.

5. The Bureau argues that "[u]nder [Kay's] rationale, there could never be a combined revocation and renewal proceeding because each party would be able to insist that the other party proceed first." *Opposition to Motion to Recuse* at 7-8. Hogwash! There can be and often are combined application and revocation hearings. To be sure, the potential conflict in such cases arising from the differing assignment of burdens under Sections 309 and 312 is an interesting legal issue. But it is not an issue that has any relevance to this proceeding. This is a pure license revocation proceeding brought under Section 312. There are no pending applications at issue in this proceeding, and Section 309(e) therefore has absolutely no bearing in this case.²

C. Status

6. Undersigned counsel for Kay have on several occasions during the past month discussed this matter with counsel for the Bureau, but the Bureau has been unwilling to enter into an agreement to accommodate Kay's legitimate statutory right. Kay has suggested a rather simple solution, namely, (a) that the currently scheduled admission's session be canceled (or alternatively, that Kay not be required to introduce his exhibits into the record at that session),

² It was the Bureau who recommended the designation order in this proceeding to the Commission. *See Petition for Extraordinary Relief*, Attachment Nos. 1 & 2. The Bureau could have quite easily chosen to recommend the designation of Kay's pending applications for hearing pursuant to Section 309(e), either in lieu of or in combination with the Section 312 revocation proceedings. Having made a voluntary choice not to do so, the Bureau may not now invoke Section 309(e) in support of an improper attempt to shift its statutorily assigned burdens to Kay.

and (b) that Kay will not be required to offer any evidence (exhibits or witnesses) prior to completion of the Bureau's case in chief. Counsel for the Bureau has been unable to state how this procedure in any way prejudices the Bureau, especially in view of the fact that Kay voluntarily provided his preliminary direct case exhibits to the Bureau.

D. Authority

7. The principal authority supporting Kay's position is Title III of the Communications Act of 1934, as amended, 47 U.S.C. § 301 *et seq.* Section 309(e) of the Act, which governs the procedures for hearings on applications for initial facilities or renewal of licenses, provides, in pertinent part: "The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant" 47 U.S.C. § 309(e). Section 312(d) of the Act, on the other hand, provides that in any hearing on the revocation of an existing license, "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission." 47 U.S.C. § 312(d). The statute could not be any more clear. Section 309 places the burden of proceeding on the applicant in initial application and renewal proceedings, and on the Commission in revocation proceedings.³ For the Presiding Judge to attempt to treat this case, which is brought exclusively under Section 312, the same as a renewal proceeding thus violates the Communications Act.

8. The Presiding Judge and the Bureau are also referred to *Algreg Cellular Engineering*, 9 FCC Rcd 5098, 75 RR 2d 1956 (Rev. Bd. 1994), in which the Review Board, although it upheld an order of a presiding judge requiring licensees in a revocation proceeding to

³ The Presiding Judge seems to believe, albeit erroneously, that the crucial determinant is whether or not basic qualifying issues are involved. For example, he has attempted to justify his resistance to Kay on this issue by citing a case that he characterized as a "renewal case with disqualifying issues." *Order* (FCC 98M-91) at 2. But basic qualifying issues may be litigated under Section 309--indeed, except in the case of comparative hearings, Section 309 hearings usually *do* involve basic qualifying issues--but the applicant still has the burdens of proceeding and proof. In a revocation hearing under Section 312, however, both burdens are, by statute, placed on the Commission.

engage exhibits in advance of the Bureau's presentation of its case (something that Kay has done voluntarily), specifically held that this did not violate Section 312(d) precisely because (a) "the Licensees did not even need to make an affirmative showing," and (b) the presiding judge "set down an order of presentation whereby *the Bureau ... would present their evidence ahead of the Licensees.*" *Id.* at ¶ 74. In this case, however, the Presiding Judge is attempting to force Kay to introduce exhibits into the record before the Bureau has even begun presenting its case.

Moreover, the Presiding Judge is seemingly requiring Kay to present one of his expert witnesses and Kay himself at a session in Washington, D.C., even though the vast majority of the Bureau's witnesses will not be presented until a subsequent session in Los Angeles. This procedure renders Section 312(d) a nullity. While the Presiding Judge may have broad discretion in directing the order of these proceedings, he decidedly does not have the discretion to ignore clearly applicable statutory provisions.

9. In the general legal literature, the "burden of proceeding" is sometimes referred to as the "burden of evidence," or the "burden of going forward with evidence," and "has been defined as meaning the burden of 'getting by' the judge to the jury, by making a prima facie showing as to each factual ingredient necessary to establish a prima facie case. Having done this, the burden shifts to the defendant to produce, *if he desires*, competent controverting evidence." *BALLENTINE'S LAW DICTIONARY* at 160-161 (3d ed. 1969) (emphasis added), *citing McCloskey v. Kolpar*, 329 Mo. 527, 46 S.W.2d 557, 751, 92 A.L.R. 641 (1932). Section 312(d) places the burden of going forward squarely on the Bureau. Kay is entitled to stand mute until the Bureau has presented a prima facie case. Only then will the burden of proceeding (but not the burden of proof) shift to Kay.

10. Both the Bureau and the Presiding Judge fail to make the very important distinction between burden of proceeding and burden of proof--two separate and discrete burdens. Thus, the Bureau argues that *Algreg* supports its interpretation of Section 312(d)


because the Review Board determined that the presiding judge's misassignment of the burden of proof was harmless error. *Opposition to Motion to Recuse* at 6. The Presiding Judge, moreover, presumes to reject Kay's arguments regarding the burden of proceeding on the theory that "the Bureau, having been assigned the burden of proof, would have the burden of persuasion throughout the hearing." *Memorandum Opinion and Order* at ¶ 12. (FCC 98M-101; released July 30, 1998). The Presiding Judge reasons that "[t]he Admissions Session procedure does not shift that burden." *Id.* Kay has never suggested that the admissions session shifts the burden of proof. But it absolutely shifts the burden of proceeding if, at that session, Kay is required to introduce exhibits into the record before the Bureau has rested its case.

11. The Presiding Judge then states: "But there can be a shifting of the order of production after the Bureau has made its documentary 'prima facie' showing. *Id.* (emphasis added) Kay has no objection to being required to put in his evidence, if any, *after* the Bureau has made its prima facie case, and Section 312(d) prohibits requiring Kay to proceed with the introduction of evidence before that time. But the Presiding Judge is attempting to have Kay introduce evidence (*i.e.*, exhibits), before the Bureau has even presented its first witness. The Presiding Judge attempts to justify this, moreover, by effectively prejudging the case: "After the Bureau introduces its nine volumes of documents at the Admissions Session, it probably will have met its document production burden." *Memorandum Opinion and Order* at ¶ 12 n.5. The Presiding Judge has thus prejudged in advance that (a) all of the Bureau's exhibits will be admitted, even though he has not yet heard, much less impartially considered and ruled on, any objections by Kay; and (b) the documents offered by the Bureau, standing alone, make a prima facie case on all issues that could warrant license revocation, without his having heard a single sponsoring witness or any cross-examination by Kay.

12. Entirely apart from the fact that this confirms Kay's belief that the Presiding Judge is biased and has prejudged this case adversely to Kay, the Presiding Judge may not prematurely shift the burden of proceeding to Kay based on his prognostication that the Bureau "will have made" a prima facie case. Common sense as well as Section 312(d) rather demand that he reserve his determination as to whether the Bureau has made a prima facie case at least until there is some evidence in the record!

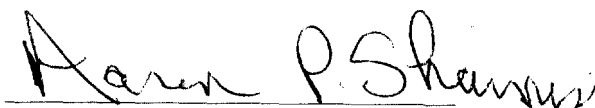
Respectfully submitted this 30th day of July, 1998

JAMES A. KAY, JR.

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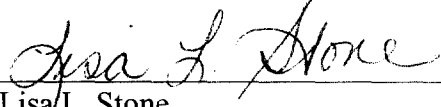
CERTIFICATE OF SERVICE

I, Lisa L. Stone, a secretary in the law firm of Shainis & Peltzman, Chartered, do hereby certify that on this 30th day of July, 1998, copies of the foregoing document were sent, via First-Class Mail, postage prepaid, to the following:

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